BEFORE THE
SOUTH CAROLINA PUBLIC SERVICE COMMISSION

IN RE:	)	
	)	
Analysis of Continued Availability of Unbundled Local Switching for Mass Market Customers Pursuant to the Federal Communications Commission's Triennial Review Order	)	**DOCKET 2003-326-C**
	)	**Filed: March 31, 2004**
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	)	

SURREBUTTAL TESTIMONY OF
JOSEPH GILLAN
ON BEHALF OF COMPSOUTH

Q. Please state your name and the party you are representing.

A. My name is Joseph Gillan. I filed direct testimony on behalf of CompSouth in this proceeding.

Q. What is the purpose of your surrebuttal testimony?

A. The purpose of my surrebuttal testimony is to address BellSouth's claims in its rebuttal testimony that:

* The South Carolina Commission should ignore its own statutory objectives because *BellSouth* has concluded that the FCC would preempt South Carolina law (which should be sufficient to skip the step of actually asking the FCC to do so);

* The South Carolina Commission has no authority to arbitrate pricing disputes under section 271 of the Act, thereby freeing BellSouth to unilaterally decide what rates CLECs should pay for the unbundled local switching specifically listed in section 271's competitive checklist; and,

* The FCC's "trigger" or "actual competition" test is disconnected from all explanatory discussion in the TRO as to the factors that the FCC intended the states consider to assure consistency between the FCC's analysis and that of the states.

BellSouth recently announced its earnings for 2003. Even with CLECs having access to unbundled local switching, BellSouth is solidifying its dominance of the mass market throughout the Southeast. In just over a year since it gained approval to offer long distance service, it has achieved a 30% share of the mass market (compared to UNE-P's regional share, for all CLECs combined, of 10%).

While there are number of complex issues being debated, the bottom line is that BellSouth is asking this Commission to find, on the basis of the rapidly *shrinking* analog loop activity of a handful of carriers that in total amounts to a roughly 0.5% share of the mass market,[1] that CLECs are not impaired without access to

[1] See Confidential Exhibit JPG-7 attached to my rebuttal testimony. This exhibit provides

UNE-P. This type of exaggerated reasoning, however, is exactly the type rejected by the FCC in the TRO. In effect, BellSouth is attempting to reverse the FCC's impairment finding in South Carolina using data no different than that relied upon by the FCC to find impairment in the first place.

The Role of the South Carolina Commission under State Law

Q. BellSouth suggests that the South Carolina Commission should ignore South Carolina law in evaluating the issues in this proceeding.[2] Do you agree?

A. No. First, I note that BellSouth at least agrees that there is state law authority on unbundling, adopted as part of a package of reforms that included removing BellSouth from rate-of-return regulation. Although BellSouth acknowledges the existence of the statute, it *suggests* – but never unambiguously states – that the state law has been preempted by federal action through *selective* citation to the TRO:

> We find nothing in the language of section 251(d)(3) to limit its application to state rulemaking actions. Therefore, we find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection

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the best source of carrier-level data in the proceeding.

[2] Blake Rebuttal Testimony, pages 3 and 4.

> agreement, must be consistent with section 251 and must not "substantially prevent" its implementation…. If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.[3]

Q. Has BellSouth cited the TRO correctly?

A. No. BellSouth left out the important third sentence in the cited passage that reads:

> Parties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission.[4]

The omitted sentence that BellSouth did not want the Commission to consider is the one which establishes the process by which a claim of preemption should be tested. Significantly, the process does not direct state commissions generally (to ignore state law or the policy choices made by the legislative branch. Rather, it sets forth a defined process whereby a specific state unbundling obligation may be challenged through a request for a declaratory ruling. BellSouth is well aware of

[3] Blake Rebuttal Testimony, page 4 (partially citing TRO ¶¶ 194-195).

[4] TRO ¶ 195.

this process that the FCC has set forth,[5] a process that requires that BellSouth actually request preemption, not merely assert what the FCC would do if asked.

Q. Do you believe that BellSouth's unbundling obligations under South Carolina law would be found "inconsistent with" or "would substantially prevent implementation of" the federal regime?

A. No, not at all. South Carolina law may be used to require *more* of BellSouth than the federal Act; but that would be, in part, because South Carolina law grants BellSouth *additional* freedoms (the deregulation of its profits) that are not addressed by the federal Act. The relationship between the unbundling obligations of South Carolina law and the federal Act cannot be evaluated in isolation; these unbundling provisions are part of a package of reforms that included the reduced regulation of BellSouth. There is simply no basis to conclude that the FCC would (or could) find that the balance of unbundling/deregulation in South Carolina law is inconsistent with the federal Act, which may explain why BellSouth would rather suggest a federal preemption than request one.

[5] See BellSouth Emergency Request for Declaratory Ruling, File No. 03-251, December 9, 2003.

Q. Does the federal Act similarly scale unbundling obligations to the grant of additional freedoms?

A. Yes. Even under the federal Act, BellSouth is subject to varying layers of unbundling obligations, recognizing that where additional benefits (to BellSouth) or harms (to consumers) are possible, that additional unbundling obligations are appropriate. For instance, as an incumbent local exchange carrier, BellSouth is obligated to unbundle wherever an entrant would be "impaired" without access to a network element (section 251). Moreover, BellSouth is subject to additional unbundling obligations under section 271 of the Act in recognition of the special threat that its interLATA entry holds:

> These additional requirements [the unbundling obligations in the competitive checklist] reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market…. The protection of the interexchange market is reflected in the fact that section 271 primarily places in each BOC's hands the ability to determine if and when it will enter the long distance market. If the BOC is unwilling to open its local telecommunications markets to competition or apply for relief, the interexchange market remains protected because the BOC will not receive section 271 authorization.[6]

South Carolina law embodies a similar approach – in exchange for additional freedoms, BellSouth must comply with additional obligations. What is truly

[6] TRO ¶ 655.

remarkable about section 271 and South Carolina law, however, is that BellSouth has managed to arrange for unbundling to be part of two *quid quo pros* – BellSouth agreed to unbundle its network in exchange for deregulated profits (South Carolina Act), and it agreed to unbundling once again in order to offer interLATA long distance service (section 271). Having traded the same obligation twice, BellSouth has the audacity to now suggest that its *quid* should be preempted, while its *quo* should remain intact.

Q. Has BellSouth's view of federal preemption recently been addressed by a court?

A. Yes. BellSouth appealed a decision by the Kentucky Public Service Commission that prohibited BellSouth from refusing to provide DSL service to customers obtaining voice service from a CLEC. (This is the same issue that BellSouth has asked the FCC to address through a declaratory ruling). Certainly, the federal district court did not agree with BellSouth's views on federal preemption:

> It [the Kentucky Commission's requirement] establishes a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the [Kentucky] Commission. The PSC order does not substantially prevent implementation of federal statutory requirements and thus, it is the Court's determination that there is no federal preemption.[7]

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[7] Memorandum Opinion and Order, Civil Action No. 03-23-JMH, BellSouth

Section 271 Pricing

Q. Ms. Blake opposes your recommendation that the Commission establish a proceeding to address any section 271 pricing disputes. [8] Do you agree with her analysis?

A. No. There are two issues raised in connection with BellSouth's obligation to continue to provide unbundled local switching under section 271's competitive checklist. The first concerns whether the South Carolina Commission has the jurisdiction to establish the "just and reasonable rate," which is the pricing standard adopted by the FCC. The second issue concerns what the appropriate just and reasonable rate should be, which requires that the Commission determine the process that will be used to establish the rate.[9]

Q. Does the South Carolina Commission have the "first level" jurisdiction to arbitrate the just and reasonable rate for unbundled local switching under section 271 of the federal Act?

Telecommunications v. Cinergy Communications Company, United States District Court, Eastern District of Kentucky, December 29, 2003.

[8] Blake Rebuttal, page 6.

[9] I recognize that this second issue is affected by whether the Commission has jurisdiction.

A. Yes. Section 271 of the Act makes clear that the items listed in the competitive checklist – including local switching – must be provided in one or more interconnection agreements or through its statement of generally available terms and conditions (SGAT),[10] both of which are subject to state review and approval under section 252 of the Act. Although the FCC has adopted a (potentially)[11] different pricing standard for section 271 network elements, it has never excused BellSouth from the arbitration procedure in section 252.

As the Commission aware, there are a number of overlapping responsibilities in the federal Act between the states and the FCC. For instance, the FCC has the authority to review the UNE rates established by this Commission, to assure that those rates comply with its TELRIC rules and section 271 (when those TELRIC rules apply). This issue is no different. State commissions have the first responsibility to *adjudicate* interconnection disputes by applying federal pricing rules – in this instance, applying the just and reasonable standard – while the FCC may review these same rates through an *enforcement* action (or initial section 271 application, if relevant). Nowhere has the FCC changed this basic scheme – the mere fact that the FCC recognized its continuing enforcement authority under section 271 did not eliminate the states' arbitration authority under the Act.

[10] §271(c)(2)(A) Agreement Required.

[11] As I explain in below, the FCC's pricing standard for section 271 network elements (just and reasonable) includes, by statutory definition, the TELRIC-based rates established by the Commission.

Q. Is it particularly important the BellSouth correctly price network elements offered under Section 271 of the Act?

A. Yes. As noted earlier, BellSouth is subject to additional unbundling obligations under section 271 of the Act in recognition of the special threat that its interLATA entry holds. These protections would be meaningless if BellSouth could unilaterally establish prices for section 271 network elements. Yet, this is what BellSouth seems to be suggesting, by claiming that it has the right to set the rates:

> As such, it is appropriate for BellSouth to set its rate according to those market conditions through negotiation with the CLEC.[12]

Exactly what negotiations is BellSouth referring to here? Under the federal Act, CLECs have the right to have disputes arbitrated before state commissions where negotiations fail. Yet here, BellSouth is opposing the Commission's involvement, suggesting that BellSouth should "set the rate." The issue has never been whether BellSouth and the CLECs should try and negotiate (a triumph of hope over experience); the relevant issue is only <u>how</u> should any dispute be resolved.

[12] Blake Rebuttal, page 7.

Q. How are you recommending the Commission establish the section 271 just and reasonable rate?

A. I believe the Commission has two options. First, the Commission can simply find here that the TELRIC-based rate is also the just and reasonable rate under section 271 of the Act. There is ample justification for this finding, including:

* The federal Act requires that TELRIC-based rates be just and reasonable,[13] therefore, by definition, these rates are unambiguously within the range of just and reasonable rates;

* BellSouth has admitted that TELRIC rules for switching are not unreasonable, and are effectively the same as the TSLRIC cost standard that it endorses; and

* The TELRIC-based rates for local switching in South Carolina exceed BellSouth's "actual" embedded cost of switching.

Consequently, the evidence fully supports the Commission retaining the existing TELRIC-based rates for local switching required to be unbundled under section

[13] Section 252(d)(1)(A) states that "the just and reasonable rate for network elements …shall be based on cost," which the FCC has determined must be TELRIC.

271 of the Act. Alternatively, I recommend that the Commission clearly assert jurisdiction and establish a proceeding to analyze the rate-level issue, with existing TELRIC-based rates continuing in the interim.

Q. Why do you say that the TELRIC rules fairly compensate BellSouth for local switching?

A. The TELRIC pricing standard fully compensates BellSouth at the forward looking average cost of switching. It is important to understand that the issues that surround TELRIC pricing are loop-related, and do not apply to switching. For instance, a heavy reliance on "actual network topology" is already a feature of the TELRIC process for local switching because the number of wire centers (and, therefore, the number and location of switches) is fixed in the TELRIC model. Consequently, the "actual topology of the ILEC network" is already considered in determining TELRIC switching costs and the side-debate about the appropriateness of this aspect of TELRIC plays no role in evaluating whether switching prices are reasonable.

Q. Does BellSouth agree that TELRIC is an appropriate pricing standard for switching?

A. Yes. In this very state, BellSouth has testified to very same point I raised above:

> It is important to note that even though the fundamental cost methodologies (i.e., TSLRIC and TELRIC methodologies are similar … it is the additional constraints currently mandated by the FCC that the incumbent local exchange carriers (ILECs) object to with respect to TELRIC-based rates. The use of a hypothetical network and most efficient, least-cost provider requirements have distorted the TELRIC results and normally understate the true forward-looking costs of the ILEC.
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> These distortions, however, are most evident in the calculation of unbundled loop elements, and they are less evident in the switching and transport network elements that make up switched access.
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> …I emphasize that the main cost drivers for end office switching are the fundamental unit investments, which are identical in switching TSLRIC and TELRIC studies.[14]

Thus, BellSouth has acknowledged that its objections to TELRIC do not apply to switching, that TELRIC and TSLRIC for switching are essentially the same and that, for the main cost drivers, they are identical. Consequently, there is no reason to conclude that different just and reasonable rates are appropriate for section 271 switching network elements than for section 251 switching network elements.

Q. BellSouth claims that its unbundled local switching rate is subsidized.[15] Is there any evidence that this is the case?

[14] Direct Testimony on Robert McKnight on behalf of BellSouth, Public Service Commission of South Carolina (McKnight Direct), Docket No. 1977-239-C, filed December 31, 2003, pages 7 and 9.

[15] Blake Rebuttal, page 11.

A. None. First, as noted above, BellSouth agrees that TELRIC and TSLRIC for switching are identical and that, further, "[s]ince TSLRIC reflects all of the direct costs, i.e., both volume sensitive and volume insensitive costs, TSLRIC studies are the basis for testing for cross subsidization."[16] Therefore, TELRIC-based switching rates are not being subsidized. This conclusion is consistent with the testimony of BellSouth's economist, who testified in Florida:

> Cross-subsidization is measured using forward-looking incremental costs, not historical accounting costs…. Even reasonable allocations of fixed costs or common overhead costs to a service have no role in a subsidy test…[17]

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> The fact that TELRIC includes an allocation of shared fixed and common costs means that the TELRIC-based UNE price would be too high for a price floor.[18]

Thus, even BellSouth agrees that TELRIC-based UNE rates for local switching are not being subsidized.

[16] McKnight Direct, page 6.

[17] Rebuttal Testimony of William Taylor on behalf of BellSouth, Docket Nos. 02-0119-TP and 020578-TP, filed November 25, 2002 ("Taylor Rebuttal"), page 18.

[18] Taylor Rebuttal, Page 6.

Q. Have you also compared BellSouth's TELRIC-based local switching rates in South Carolina to an estimate of its embedded cost?

A. Yes. Table 1 below compares BellSouth's average TELRIC-based local switching rate to an estimate of its "actual embedded" cost, as reflected in its ARMIS filings:

Table 1: BellSouth's Average Direct Embedded Switching Cost

Cost Category	2002 ARMIS	Per Line
Central Office Switching Expense	$17,750	$1.04
Estimated Switch-Related Depreciation[19]	$17,698	$1.04
Average Direct Embedded Cost		$2.08
Average TELRIC Rate		$5.71
	Difference	$3.63

As the table above shows, the TELRIC-based UNE rates[20] (which BellSouth has agreed, at least in principle, are comparable to TSLRIC) are above the estimate of its direct embedded cost.[21] Under a variety of standards – TELRIC, TSLRIC and embedded cost (which is offered here for completeness, not as an appropriate

[19] 2002 switch-related depreciation estimated by applying a 10-year straight-line depreciation to the net change in Central Office Plant in Service reported in ARMIS for all years since 1993.

[20] The average TELRIC revenue in Table 1 does not include revenues obtained from the CLEC for billing records, although the embedded cost category does include costs associated with recording call detail. As a result, a more precise comparison would likely show revenues exceeding costs by a larger amount than shown in the table.

[21] Table 1 is not intended to perfectly estimate BellSouth's embedded cost of switching (an effort I would not recommend). Rather, the point is to give scale to the relative relationship between its UNE rates and the direct embedded costs (expenses and depreciation) associated with switching to show that switching is providing "contribution" to other costs (such as profit and overhead).

costing approach) – the existing UNE rates for local switching are unambiguously just and reasonable (if not excessive). Consequently, although the FCC has modified the pricing standard from a strictly TELRIC-based standard to a potentially more liberal "just and reasonable" standard, there is ample evidence that the existing rates are justified under both.[22]

Q. Should the Commission expect a wholesale market for unbundled local switching to serve mass market customers?

A. No, certainly not in the near term. The fundamental predicate to a competitive wholesale market is the ability for CLEC-switches to access loops in a manner that is economically equivalent to the manner available to BellSouth. BellSouth's switching is collocated with loop facilities and generally pre-wired to the outside plant. As such, customers can be electronically migrated between BellSouth and the CLEC (and back to BellSouth or to another CLEC) when wholesale switching is leased from BellSouth. No external switch (that is, a CLEC-owned switch) has this access to BellSouth's loop facilities. These problems are systemic and, as a practical matter, can only be corrected through a redesign of the local network

[22] I remind the Commission that the Act itself defines the cost-based rates of section 252(d)(1), which the FCC requires satisfy its TELRIC-rules, are just and reasonable.

that may not be warranted for analog POTS service in an era where most new investment is likely to be packet-oriented.[23]

Q. BellSouth also opposes your proposal for a two-year quiet period, arguing that you are attempting to extend UNE-P as long as possible.[24] How do you respond?

A. As my direct, rebuttal and surrebuttal testimony (above) makes clear, BellSouth is obligated to provide UNE-P under section 271 of the Act indefinitely (or at least until the FCC decides to forebear from holding BellSouth to its terms). The rationale for the recommendation is not so much to extend the availability of UNE-P (which must be offered in any event, at least for the foreseeable future), as much as it is to reduce BellSouth's advantage from perpetual litigation. The FCC clearly gave the states the latitude to establish filing windows to manage their resources – and the resources of the industry – more effectively, and the Commission should do so here.

[23] This would suggest that it may be wiser to *prevent* the same type of discriminatory access arrangements from emerging for packet-based services, than it is to devote resources to *fixing* those problems for analog-based services (which are largely fixed already through access to unbundled local switching). The task of creating an open packet-access network, however, is made more complicated by the FCC's decision to limit unbundling obligations for packet loops.

[24] Blake Rebuttal, page 7.

Q. Ms. Blake suggests that the Commission need not worry about removing local switching in some exchanges, because "UNE-P itself will remain in place in those markets where relief is not granted."[25] Do you agree?

A. No. Although Ms Blake's claim may be true in a "regulatory sense," it is not likely to be true in a real sense. The statewide competition that the Commission sees today is the product of statewide UNE-P availability – in urban areas, in suburban areas and in rural areas. This competition is linked – that is, the ability of carriers to serve high cost rural areas is tied to their ability to compete in less costly urban and suburban areas as well.

If the Commission makes the mistake of redlining any part of the state, the impact of that decision is likely to extend beyond the redlined area to other parts of the state as well. It is a mistake to think that the Commission can punch "holes" in the mass market and expect it to operate efficiently.

The TRO Does Not Compel Blindness

Q. Ms. Blake complains that the "de minimus" criteria outlined in your testimony cannot be found in the TRO.[26] Do you agree?

[25] Blake Rebuttal, page 9.

[26] Blake Rebuttal, page 19.

A. No, not at all. The TRO is quite clear that the FCC expects the states were to apply judgment in the same manner as the FCC: "To ensure that the states implement their delegated authority in the same carefully targeted manner as our federal determinations, we set forth in this Order federal guidelines to be applied by the states in the execution of their authority pursuant to federal law."[27] A faithful application of the triggers should produce outcomes consistent with the FCC's own findings – that is, where a state commission observes facts that are comparable to data that the FCC used to find impairment, then that *same* set of facts cannot be abused in a "trigger analysis" to reverse that finding.

There is nothing in the TRO that suggests the FCC expected the states to apply the trigger analysis in a manner that ignored its guidance, with the result being states reversing the FCC's national impairment finding by reviewing data no different than the FCC considered. Rather, the FCC expected consistency between its analysis and that of the states, with similar facts producing similar results:

> For example, we [the FCC] note that CMRS does not yet equal traditional incumbent LEC services in its quality, its ability to handle data traffic, its ubiquity, and its ability to provide broadband services to the mass market. Thus, just as CMRS

[27] TRO ¶ 189.

> deployment does not persuade us to reject our nationwide finding of impairment, at this time, we do not expect state commissions to consider CMRS providers in their application of the triggers.[28]

Moreover, in the same passage as above, the FCC directed the states to consider its overall analysis, as outlined in Section V of the TRO (Principles of Unbundling), as it looked into whether "intermodal providers" should be counted as triggers:

> As in the impairment triggers for high-capacity loops and dedicated transport, states also shall consider carriers that provide intermodal voice service using their own switch facilities (including packet and soft switches) that meet the requirements of these triggers and Part V above.[29]

Obviously, it makes no sense to insist that the states conduct a consistent analysis when reviewing intermodal candidates, while sanctioning a completely inconsistent approach when reviewing more conventional carriers.[30] Rather, the FCC was explicit:

> As explained in detail below, we do establish 'objective, carefully defined criteria for determining where unbundling is (and is not)

[28] TRO ¶ 499, n. 1549, footnotes omitted, emphasis added.

[29] Ibid.

[30] I note that Ms. Blake remarkably argues that my analysis is flawed because, in part, it references ¶438 of the TRO, which "appears well before the section that establishes the trigger test." (Blake, page 20). In the very next page, however, Ms. Blake (partially) cites to ¶ 428 for the proposition that the triggers are "objective," apparently unconcerned with the mathematical placement of this paragraph in relation to the trigger section.

> appropriate.' These criteria – including our triggers – ensure that states undertake the tasks we give them consistently with the statute's substantive standards and stay within the parameters of federally established guidelines.[31]

Q. Does BellSouth's claim that the triggers are satisfied in South Carolina comply with this principle (i.e., that consistent facts should produce consistent findings)?

A. No. It is useful to place BellSouth's fundamental claims regarding the level of switch-trigger activity in perspective. Confidential Exhibit JPG-7 (attached to my rebuttal testimony) summarized the analog-loop activity of BellSouth's claimed trigger companies in South Carolina. As that exhibit clearly demonstrates, analog loop activity is trivial (less than 0.5%) and declining (average decline over the past 18 months of 21%).

Q. Has the FCC repeatedly reject market activity on the level claimed by BellSouth here as proving non-impairment?

A. Yes. For example, consider the following claims of low-level competitive activity that all ended with the FCC national finding of impairment for mass market switching:

[31] TRO ¶ 428, footnotes omitted, emphasis added.

> …the record indicates that competitive LECs have self-deployed few local circuit switches to serve the mass market. The BOCs claim that, as of year-end 2001, approximately three million residential lines were served via competitive LEC switches. Others argue that this figure is significantly inflated. Even accepting that figure, however, it represents only a small percentage of the residential voice market. It amounts to less than three percent of the 112 million residential voice lines served by reporting incumbent LECs.[32]
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> We determine that, although the existence of intermodal switching is a factor to consider in establishing our unbundling requirements, current evidence of deployment does not presently warrant a finding of no impairment with regard to local circuit switching. In particular, we determine that the limited use of intermodal circuit switching alternatives for the mass market is insufficient for us to make a finding of no impairment in this market, especially since these intermodal alternatives are not generally available to new competitors.[33]
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> The Commission's *Local Competition Report* shows that only about 2.6 million homes subscribe to cable telephony on a nationwide basis, even though there are approximately 103.4 million households in the United States [2.6 percent]. Moreover, the record indicates that circuit-switched cable telephony is only available to about 9.6 percent of the total households in the nation … it is difficult to predict at what point cable telephony will be deployed on a more widespread and ubiquitous basis.[34]
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[32] TRO ¶ 438, footnotes omitted, emphasis added.

[33] TRO ¶ 443, footnotes omitted, emphasis added.

[34] TRO ¶ 444, footnotes omitted, emphasis added.

> Current estimates are that only 1.7% of U.S. households rely on other technologies to replace their traditional wireline voice service.[35]
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> ***
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> We also find that, despite evidence demonstrating that narrowband local services are widely available through CMRS providers, wireless is not yet a suitable substitute for local circuit switching. In particular, only about three to five percent of CMRS subscribers use their service as a replacement for primary fixed voice wireline service, which indicates that wireless switches do not yet act broadly as an intermodal replacement for traditional wireline circuit switches.[36]

The ILECs have already tried to use low levels of competitive activity as marketplace evidence of non-impairment and the FCC's rejected those attempts with a national finding of impairment. Obviously, it would be inconsistent for the FCC to delegate to the states a trigger analysis that, when applied to data showing the same *de minimus* levels of competitive activity reviewed and rejected by the FCC, produced findings that reversed the FCC's national finding of impairment.

Q. Dr. Aron claims that you are recommending that the Commission "ignore the plain language" of the FCC's rules in your comments regarding the potential deployment analysis.[37] How do you respond?

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35 TRO ¶ 443, n. 1356, emphasis added.

36 TRO ¶ 445, footnotes omitted, emphasis added.

37 Aron Rebuttal, page 42.

A. Dr. Aron's exaggerates my testimony. The point that I was making is that the Commission should approach with skepticism testimony (such as BellSouth's testimony here) that claims that actual investors "got it wrong," while a incumbent-sponsored model here about CLEC profitability will "get it right." If BellSouth used the BACE model to plan its entry out-of-region, then (at least in *those* states) it may be a useful tool. But there is no reason to think it makes sense here.

I note, moreover, that Dr. Aron has not demonstrated any particular skill at predicting, in real time, which CLEC models would be most successful. In an affidavit she filed in the Michigan 271 proceeding, Dr. Aron provided her prediction of the market:

> While some business models proved to be flawed and unsustainable, a surprising variety are demonstrating to investors their possibility for success, at least as an entry strategy. The chronicles of the (so-far) successful CLECs prove interesting case studies about the possibility of a variety of approaches to competitive entry. Earlier I mentioned that four such CLECs are McLeodUSA, Time Warner Telecom, Allegiance Telecom, Inc., and possibly XO Communications. Remarkably enough, each of these CLECs exhibits a distinctly different entry strategy. One firm, McLeodUSA, used and continues to use resale as an initial entry method. Time Warner Telecom and XO Communications use substantially their own self-provisioned networks, with Time Warner focusing on larger business in the US, and XO on smaller and medium-sized businesses in both domestic and Western European markets. The success of these firms, which have been called the "four horsemen" of the CLEC world, demonstrates that

> each of the entry paths provided for by TA96 can be used successfully by efficient firms.[38]

The CLECs that Dr. Aron pointed to as the "model CLECs" just a few short years ago, however, have been far less successful than Dr. Aron expected, with three of the CLECs – XO, McLeod and Allegiance – all declaring bankruptcy. The only CLEC to not declare bankruptcy – Time Warner Telecom – does not compete in the mass market, as even BellSouth agrees.[39]

At the end of the day, the Commission should weigh the relative merits of BellSouth's basic claim – i.e., that UNE-L's inconsequential market share and its better-than-any-investor model prove that CLECs are not impaired without access to unbundled local switching – against the demonstrated market outcome of UNE-P bringing competitive choice throughout the state and reach its findings accordingly.

Q. Does this conclude your surrebuttal testimony?

A. Yes.

[38] Reply Affidavit of Dr. Debra Aron, on behalf of Ameritech Michigan, Case No. U-12320, July 30, 2001, page 12.

[39] BellSouth withdrew its claim that Time Warner was a self-provisioning mass market switch trigger in Florida, and never named them here in South Carolina.